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CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED MEMORANDUM

DATE: February 2, 2017

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: Night Shift Differential and Overtime Update

I. Background

In February 2016, representatives from the United States Department of Labor ("DOL") met with representatives of the Hotel Association of New York City, Inc. and the New York Hotel & Motel Trades Council (the "Union") regarding the overtime provisions of the Fair Labor Standards Act ("FLSA") and the impact of such provisions on Article 51 of the IWA, Night Shift Differential.

IWA Article 51(C)(1) (and Article IX(e) of the Division A contract) states that night shift differential is not included in overtime calculations. Accordingly, under the IWA and Division A contract, and consistent with the FLSA, employees who work less than forty (40) hours in a week do not have night shift differential included in their contractual overtime calculations, *i.e.*, overtime hours worked under forty (40), including daily overtime, 6th and 7th day overtime and 36-40 overtime hours for non-tipped employees. The FLSA requires, however, the inclusion of night shift differential pay in the calculation of federal, or FLSA, overtime, *i.e.*, all hours worked over forty (40) in a workweek.

The Association agreed, and the Union volunteered, to distribute RFI's to all Hotels and concessionaires, which sought certain payroll and related information in lieu of an audit by the DOL.

II. The Union's Voluntary Settlement Agreement ("VSA")

Once Hotels responded to the RFIs, the Union sent VSAs to Hotels that contained a calculation of back pay, which overstated any liability because it included night shift differential in the calculation of both FLSA and contractual overtime. In addition, the Union VSA did not take into account credits against overtime, which the FLSA permits.[1]

III. Our Recommendations

As reported over the last year, it is the position of the Association that Hotels should follow the FLSA methodology unless your Hotel has a practice of calculating overtime as the Union does; or, in the absence of a practice, your Hotel chooses to follow the Union methodology because of ease of payroll administration. Accordingly, we have provided Hotels with several options:

1. Refrain from signing the VSA, but pay the back pay amounts calculated by the Union:

   If you choose to do so, we have been advised by the DOL that Hotels should pay each employee directly, in a separate check from regular payroll, and obtain a copy of the canceled check with the employee's signature on it. This is the evidence the DOL will need in order to close out the FLSA dispute. In order to come into compliance with the FLSA, you should utilize the FLSA calculation going forward.

2. Refrain from both signing the VSA and paying back pay based upon the Union's calculations, but pay FLSA overtime:

   This requires Hotels (or their payroll company) to perform the correct FLSA calculations and present them to the DOL for resolution of the issue.

3. Sign the VSA and pay employees in accordance with the Union's calculations:

   Hotels that do so must recognize that they are committing to include in the future night shift differential in overtime pay for all purposes under the IWA or Division A CBA, notwithstanding the FLSA methodology that could result in lesser amounts or no FLSA liability at all.

With regard to the VSAs which the Union has distributed to Hotels, we have pointed out that these agreements obligate Hotels to include night shift differential in the calculation of all overtime, not solely FLSA overtime, by virtue of the following language:

[1] Credits against any FLSA liability can be taken for premium pay for (i) hours worked in excess of 7 or 8 hours in a day; (ii) premium pay for hours worked between 36 to 40 in a workweek; and (iii) premium pay for work on Saturday, Sunday, holidays, and/or 6th and 7th days of the week (when such pay is not less than 1.5 times the rate established for like work on other days/non overtime hours).

"That the Hotel and Union agree that night shift differential shall be added to the regular rate for purposes of calculating overtime compensation."

For those Hotels that do not have a practice of calculating overtime as the Union proposes, or otherwise object to that approach, but nonetheless wish to enter into an agreement with the Union, we recommend that the agreement state:

"The parties agree that night shift differential shall be added to the regular rate for purposes of calculating non-IWA overtime compensation."

The Union has stated that it will both advise the DOL of any Hotels that fail to sign the VSA -- purportedly so that the DOL can go after those Hotels for statutory violations -- and pursue its own arbitration against such Hotels. Pursuant to our conversations with it, the DOL is aware that many Hotels are not signing the VSA and instead are opting to resolve the issue directly with the DOL. As for any potential arbitration filed by the Union, Hotels should preempt such filings by resolving the back pay issue in one of the manners recommended herein.

IV. Resolution Through the DOL

The DOL agreed upon a procedure by which Hotels may pay back pay with the DOL's approval that such back wages constitute a waiver of federal overtime claims by the affected employees. Accordingly, we recommended that Hotels perform their own calculations and forward them directly to David An (an.david@dol.gov) with a copy to Jaclyn Ruocco (jruocco@kanekessler.com). If a Hotel intends to rely on the Union's calculations, it should contact Joe Messineo and ask him to forward to David An (an.david@dol.gov) a copy of the calculations with a copy to Jaclyn Ruocco (jruocco@kanekessler.com).

The DOL will review these calculations and notify the parties of their acceptability, following which payment of back wages can be made.

V. Update on the DOL Process

We recently spoke with the DOL regarding the status of its review of the night shift differential calculations submitted by various Hotels. Investigators have been assigned to review these and some of those investigators have already reached out to Hotels. They are sending a form RFI to those Hotels that seeks certain company data. **A copy of the DOL's RFI is attached here.**

According to one particular DOL investigator that we spoke with, the DOL will be looking back two years or for the period January 1, 2015 through December 31, 2016.

The following is a recap of the remainder of our conversations with the DOL:

- The DOL has signed off on the Union's calculations of back pay because, while the Union did not utilize the correct calculation, the back pay amounts are overestimates of what is owed to employees. This does not mean that you have to utilize the Union's calculations, nor the VSA drafted by them.

- The DOL anticipates that the calculations already submitted to the DOL will be reviewed by February 2017.

- The investigators will need to enter the back pay calculations in the DOL database. This database requires certain information and requires that certain fields be populated. Therefore, the DOL will be seeking the following information from Hotels:

    - Evidence of "Annual Dollar Volume" or ADV showing that the hotel has revenues equal to or exceeding $500k. This is a jurisdictional threshold under the FLSA and the DOL generally asks for a Form 1120 or 1120S to show this,

    - Names of hotel owners, including shareholders, and

    - Corporate or DBA name of the employer.

Additionally, investigators will likely send form questions once the DOL approves the calculations (*i.e.*, hours of operations, types of employees, etc.) because the database also requires this information.

We were successful in convincing the DOL to provide a Form 58 to the Hotels to close out the issue. Form 58 reflects the back pay paid by the Hotel and includes a release by the employee for any claim the employee may have for such back pay under federal law. Form 58 is not a release of claims the employee may have under state law. Proof of payment remains the same – a Hotel must provide the DOL with either canceled checks or a payroll registry report showing all of the back pay that was paid.

The DOL confirmed with us again that employers should hold off on paying back pay until the DOL approves the Hotel's calculations.

We intend to discuss this further at the upcoming HR Directors' meeting on Monday, February 6, 2017.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Robert L. Sacks, Michael Lydakis, Jennifer Schmalz or Jaclyn Ruocco.

cc: Vijay Dandapani, President and CEO
Herve Houdré, Acting Chairman
